

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

<b>WESTROCK SERVICES, INC.</b>	)	
	)	
<b>and</b>	)	
	)	<b>Case 10-CA-195617</b>
<b>GRAPHIC COMMUNICATIONS</b>	)	
<b>CONFERENCE OF THE INTERNATIONAL</b>	)	
<b>BROTHERHOOD OF TEAMSTERS,</b>	)	
<b>LOCAL 197-M</b>	)	

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**RESPONDENT'S REPLY TO OPPOSITIONS TO MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION AND DISQUALIFICATION**

WestRock Services, Inc. ("WestRock" or "Respondent") replies as follows to the Oppositions filed by Charging Party Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M (the "GCC Local") and by counsel for the General Counsel on October 26, 2017 to the Motion to Dismiss that WestRock filed on October 19, 2017:

1. The General Counsel's Opposition acknowledges, in a footnote, the significance -- and timeliness -- of the issues raised by WestRock in its Motion to Dismiss: the status of ALJs under the Appointments Clause appears headed for *certiorari* review at the Supreme Court. (See General Counsel's Opp., p. 3 n.3.)

2. In contrast, the GCC Local's Opposition pretty much ignores the "sea change" in the law created by the recent decisions in Burgess v. FDIC, 871 F.3d 297 (5th Cir. 2017), and Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016).

a. Those two decisions opened up a **new circuit split** and parted ways with the GCC Local's preferred authorities of Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017) (per curiam), and Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000).

i. The Fifth Circuit in Burgess held that FDIC ALJs are, in fact, "inferior officers" subject to the Appointments Clause. The D.C. Circuit in Landry had previously held the opposite.

ii. Likewise, the Tenth Circuit in Bandimere held that SEC ALJs are "inferior officers" subject to the Appointments Clause. The D.C. Circuit in Raymond J. Lucia Cos. faced an evenly-divided *en banc* panel, which, by virtue of the tie, denied review of the SEC's finding that its ALJs are not "inferior officers."

c. Both Burgess and Bandimere are well-reasoned decisions, and the *en banc* D.C. Circuit is evenly split on this issue; the argument that ALJs are, in fact, "inferior officers" enjoys substantial support.

d. Therefore, as the General Counsel rightly points out, this question will need to be answered by the Supreme Court, and *certiorari* review seems likely. (See General Counsel's Opp., p. 3 n.3.)

3. Thus, contrary to pages 3 through 5 of the GCC Local's Opposition and pages 4 through 12 of the General Counsel's Opposition, if the Burgess and Bandimere view prevails, then it stands to reason NLRB ALJs are also "inferior officers," just like FDIC ALJs and SEC ALJs.

a. As the Burgess court explained: "An FDIC ALJ has the broad authority to admit or exclude evidence, permit discovery and shape the course and scope of a contested hearing. Accordingly, the absence of final decision-making authority does not sufficiently undermine FDIC's ALJs' 'significant authority' such that they are employees, rather than Officers." Burgess, 871 F.3d at 303 (footnote omitted).

b. The same is equally true for NLRB ALJs.

c. This means that, if the Burgess and Bandimere view prevails, then the only remaining question is whether the NLRB's ALJs are appointed by a "Head of Department."

4. The GCC Local and the General Counsel also argue that the NLRB is a "Department" and appoints its own ALJs in accordance with the Appointments Clause (see GCC Local's Opp., pp. 6-10; General Counsel's Opp., pp. 13-16), but neither the GCC Local nor the General Counsel offer a cogent explanation distinguishing the NLRB's appointment process from the SEC's process in Bandimere, where the SEC conceded that its ALJ had not been appointed by the "Head of Department." See Bandimere, 844 F.3d at 1171.

5. The General Counsel also argues that any defect in the ALJ Ringler's appointment can be "cured" through "ratification" (see General Counsel's Opp., p. 16), but this fallback argument only underscores that there is a problem here.

a. Such "ratification" has not yet happened.

b. Accordingly, if the Burgess and Bandimere view prevails, WestRock's Motion to Dismiss should be granted.

WHEREFORE, WestRock asks that its Motion to Dismiss be granted.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed with the Office of the Executive Secretary via Electronic Filing, a copy has also been served via e-mail and/or U.S. Mail on the following, on this the 2<sup>nd</sup> day of November, 2017:

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